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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 THOMAS BROOKS,

8 Plaintiff(s),

Case No. 2:20-CV-565 JCM (EJY)

ORDER

9 v.

10 SANOFI, S.A., et al.,

11 Defendant(s).

12  
13 Presently before the court is Thomas Brooks’s (“plaintiff”) motion to remand. (ECF No.  
14 6). GlaxoSmithKline LLC (“defendant”) filed a response (ECF No. 10), to which plaintiff  
15 replied (ECF No. 12).<sup>1</sup>

16 Also before the court is defendant’s motion to stay case. (ECF No. 11).

17 **I. Background**

18 The instant action arises from plaintiff’s use of Zantac, which he alleges caused his  
19 kidney and bladder cancer. (ECF No. 1-1 at 3). Plaintiff brought eight causes of action against  
20 defendant, amongst others, in state court: (1) strict liability—design defect, (2) strict liability—  
21 failure to warn, (3) negligence, (4) breach of express warranty, (5) breach of implied warranty,  
22 (6) negligent misrepresentation, (7) fraudulent concealment and/or omissions, and (8) violations  
23 of the Nevada Deceptive Trade Practices Act. *See generally id.* Defendant removed to this court  
24 on March 23, 2020, on the basis of diversity jurisdiction. (ECF Nos. 1; 9).

25 Plaintiffs now contend that defendant wrongfully removed this action with the sole  
26 purpose of having this case transferred to pending multidistrict litigation (the “MDL”) regarding  
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28 <sup>1</sup> The parties briefed the remand motion on an expedited schedule, as plaintiff requested  
and the court ordered. (ECF Nos. 7; 8).

1 Zantac. (ECF No. 6). Plaintiffs argue that defendant has not borne its burden of showing that  
2 the amount in controversy exceeds \$75,000. *Id.*

## 3 **II. Legal Standard**

### 4 *A. Remand*

5 Pursuant to 28 U.S.C. § 1441(a), “any civil action brought in a State court of which the  
6 district courts of the United States have original jurisdiction, may be removed by the defendant  
7 or the defendants, to the district court of the United States for the district and division embracing  
8 the place where such action is pending.” 28 U.S.C. § 1441(a). “A federal court is presumed to  
9 lack jurisdiction in a particular case unless the contrary affirmatively appears.” *Stock West, Inc.*  
10 *v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

11 Upon notice of removability, a defendant has thirty days to remove a case to federal court  
12 once he knows or should have known that the case was removable. *Durham v. Lockheed Martin*  
13 *Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not  
14 charged with notice of removability “until they’ve received a paper that gives them enough  
15 information to remove.” *Id.* at 1251.

16 Specifically, “the ‘thirty day time period [for removal] . . . starts to run from defendant’s  
17 receipt of the initial pleading only when that pleading affirmatively reveals on its face’ the facts  
18 necessary for federal court jurisdiction.” *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty*  
19 *Co.*, 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). “Otherwise, the thirty-day  
20 clock doesn’t begin ticking until a defendant receives ‘a copy of an amended pleading, motion,  
21 order or other paper’ from which it can determine that the case is removable. *Id.* (quoting 28  
22 U.S.C. § 1446(b)(3)).

23 A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. §  
24 1447(c). On a motion to remand, the removing defendant faces a strong presumption against  
25 removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental*  
26 *Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67  
27 (9th Cir. 1992).

28 . . .

1           B. *Stay*

2           Courts have broad discretion in managing their dockets. *See, e.g., Landis v. N. American*  
3 *Co.*, 299 U.S. 248, 254 (1936) (courts have the inherent power to “control the disposition of the  
4 causes on its docket with economy of time and effort for itself, for counsel and for litigants”). In  
5 exercising that discretion, courts are guided by the goals of securing the just, speedy, and  
6 inexpensive resolution of actions. *See* Fed. R. Civ. P. 1.

7       **III. Discussion**

8           As an initial matter, the court must determine which motion it will address first: the  
9 motion to remand or the motion to stay. From the court’s review, few courts facing both a  
10 motion to remand and a motion to stay pending transfer to an MDL address both motions. In  
11 *Dunaway v. Purdue Pharma L.P.*, however, Judge Aleta Trauger, from the Middle District of  
12 Tennessee, held as follows:

13                       [I]f this case is not properly in the federal courts (either because we  
14                       lack jurisdiction or because the removal was defective), then the  
15                       case *should* be on a different track. Different litigation under  
                        different laws in different states is inherent to the federal system  
                        embraced by the limited jurisdiction of the federal courts.

16       *Dunaway v. Purdue Pharma L.P.*, 391 F. Supp. 3d 802, 809 (M.D. Tenn. 2019) (emphasis in  
17 original). Judge Trauger’s analysis in *Dunaway* is persuasive. When considering a pending  
18 motion to stay, Judge Trauger explained as follows:

19                       The interests of judicial economy are furthered by putting a case,  
20                       as expeditiously as possible, in a court that has the jurisdiction to  
21                       resolve it. It would not be a good use of judicial resources for the  
22                       JPML to devote its time and attention to a transfer from one federal  
23                       court to another, if the ultimate legal reality is that neither court  
24                       has or can have jurisdiction. Nor would it be a good use of the  
25                       transferee court’s resources for that court to have to deal with the  
26                       intake and processing of a case only to realize, later, that the case  
                        should be in state court. It would be a waste of judicial resources  
                        for a case to proceed in the federal courts if, ultimately, a federal  
                        court is not the appropriate court to consider plaintiffs’  
                        claims. This court can imagine few greater wastes of a court’s  
                        resources than consideration of a case that the court has no  
                        jurisdiction to decide.

27       *Id.* at 809 (internal citation, quotation marks, and alteration omitted).  
28

1 This court agrees with that analysis. Thus, the court finds it appropriate in this case to  
2 determine whether the court has jurisdiction before entertaining the motion to stay.

3 A. *Remand*

4 “In determining the amount in controversy, courts first look to the complaint. Generally,  
5 ‘the sum claimed by the plaintiff controls if the claim is apparently made in good faith.’” *Ibarra*  
6 *v. Manheim Invests., Inc.* 775 F.3d 1193, 1197 (9th Cir. 2015) (citing *St. Paul Mercury Indem.*  
7 *Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)).

8 However, a removing defendant has the burden to prove by a preponderance of the  
9 evidence that the jurisdictional amount is met. See *Sanchez v. Monumental Life Ins. Co.*, 102  
10 F.3d 398, 403–04 (9th Cir. 1996). “[T]he amount in controversy reflects the maximum recovery  
11 the plaintiff could reasonably recover.” *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 927  
12 (9th Cir. 2019). Thus, parties may submit supplemental evidence to show that the amount in  
13 controversy is in excess of \$75,000. *Sanchez*, 102 F.3d at 403–04 (citing *Singer v. State Farm*  
14 *Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)).

15 Courts consider punitive damages in determining the amount in controversy when a  
16 plaintiff can recover punitive damages as a matter of law. *Gibson v. Chrysler Corp.*, 261 F.3d  
17 927, 945 (9th Cir. 2001). Courts generally look to jury awards in analogous cases in determining  
18 how to consider punitive damages towards satisfying the jurisdictional minimum. See *Campbell*  
19 *v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011). Courts may also  
20 consider attorney’s fees in determining the amount in controversy if a plaintiff can recover such  
21 fees pursuant to a contract or statute. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir.  
22 1998).

23 Here, plaintiff prays for the following relief:

- 24 (a) For general (non-economic) and special (economic) damages in  
25 a sum in excess of the jurisdictional minimum of this Court;
- 26 (b) For medical, incidental, and hospital expenses according to  
proof;
- 27 (c) For pre-judgment and post-judgment interest as provided by  
28 law;
- (d) For full refund of all purchase costs Plaintiff paid for Zantac;

1 (e) For compensatory damages in excess of the jurisdictional  
2 minimum of this Court;

3 (f) For consequential damages in excess of the jurisdictional  
4 minimum of this Court;

5 (g) For expenses and costs of this action; and

6 (h) For such further relief as this Court deems necessary, just, and  
7 proper.

8 *Id.* at 34. Throughout his complaint, plaintiff also requests punitive damages and attorney fees.

9 *Id.* at 19, 21, 22, 24, 25, 28, 33, 34.

10 As relevant in this case, a plaintiff can recover punitive damages under Nevada law only  
11 by proving with clear and convincing evidence that the defendant is guilty of oppression, fraud,  
12 or malice. Nev. Rev. Stat. 42.005(1). Here, plaintiff alleges several causes of action that sound  
13 in fraud. (*See* ECF No. 1-1). Thus, in light of NRS 42.005, the court will consider punitive  
14 damages for jurisdictional purposes. However, neither party indicates under what statute, if any,  
15 plaintiff would be entitled to recover attorney fees. Therefore, the court will not consider  
16 attorney fees when determining the amount in controversy.

17 Plaintiff argues in both his motion and reply that defendant has failed to prove, by a  
18 preponderance of the evidence, that the amount in controversy exceeds \$75,000. (*See generally*  
19 ECF Nos. 6; 12). In particular, plaintiff relies on the fact that the complaint alleges damages “in  
20 a sum in excess of the jurisdictional minimum of [the state] [c]ourt,” to wit, \$15,000. (ECF No.  
21 1-1 at 34). But, as defendant points out, “Nevada state courts allow plaintiffs to plead only that  
22 their damages are ‘in excess of \$15,000,’ so it is often the case that the amount in controversy is  
23 not apparent from a simple examination of the [c]omplaint.” (ECF No. 10 at 3–4 (citing Nev. R.  
24 Civ. P. 8(a)(4))).

25 The court finds that the allegations in the complaint establish, by a preponderance of the  
26 evidence, that the amount in controversy exceeds \$75,000. Plaintiff requested “medical,  
27 incidental, and hospital expenses”; to date, he has already undergone “3 bladder surgeries,  
28 Transurethral Resection of Bladder Tumor (TURBT), 2 cystoscopies, 1 chemotherapy treatment

1 following the third bladder surgery, and 9 Bacillus Calmette-Guerin (BCG) treatments.” (ECF  
2 No. 1-1 at 3). Plaintiff also “undergoes a cystoscopy every 3 months.” *Id.*

3 Defendant submits the affirmation of Dr. Anobel Odisho, who indicated that “based on  
4 [his] own professional experience and the medical literature, it is clear that the usual and  
5 customary lifetime cost for care and treatment of a patient with bladder cancer exceeds \$75,000.”  
6 (ECF No. 10-1 at 2). Dr. Odisho further indicates that “[a] study, published in 2014, reported  
7 that the lifetime expected cost for bladder cancer was \$102,700, in 2013 dollars.” *Id.* at 2–3  
8 (citing Yeung, Christina, et al. “The Health Economics of Bladder Cancer: An Updated Review  
9 of the Published Literature.” *PharmacoEconomics*, vol. 32, no. 11, Nov. 2014, pp. 1093–104.  
10 Crossref, doi:10.1007/s40273-014-0194-2). Dr. Odisho notes that the complaint omits the cost  
11 of treatment for plaintiff’s kidney cancer, which “would be in addition to his bladder cancer  
12 treatment costs.” *Id.* at 3.

13 Further, defendant points to several other cases where a pharmaceutical product was  
14 alleged to cause cancer. (ECF No. 10 at 6–7). In these cases, juries awarded millions of dollars  
15 in punitive damages. *Id.* (citing *Allen v. Takeda*, 2008 WL 876652 (\$9 million in punitive  
16 damages awarded in case alleging diabetes medication caused bladder cancer); *Rowatt v. Wyeth*,  
17 2008 WL 876652 (\$99 million in punitive damages awarded in case alleging hormone  
18 replacement therapy caused breast cancer); *Wooderson v. Ortho Pharma. Corp.*, 1984 WL  
19 320309 (Kan. Jan 1, 1984) (\$2.75 million in punitive damages awarded in case alleging oral  
20 contraceptive caused kidney failure and hypertension); *Wirt v. Am. Home Prods. Corp.*, 99-cv-  
21 0307, 2000 WL 1266416 (Or. Dist. Ct. May 1, 2000) (\$12.45 million in punitive damages  
22 awarded in case alleging diet medication caused heart damage); *Batson v. Am. Home Prods.*  
23 *Corp.*, 99-cv-0306, 2000 WL 1266414 (Or. Dist. Ct. May 1, 2000) (\$12.9 million in punitive  
24 damages awarded in case alleging diet medication caused heart damage)).

25 Even if the court applied a “conservative” estimate at a 1:1 ratio of punitive to economic  
26 damages,<sup>2</sup> plaintiff’s past and future costs of care for two different forms of cancer would need

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28 <sup>2</sup> See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007) (noting that  
the district court in that case “conservatively estimated” punitive damages “at a 1:1 ratio to

1 to amount to only \$37,500 to meet the amount in controversy. Notably, this is without  
2 considering any of plaintiff's other requested relief.

3 In reply, plaintiff argues only that defendant has not sufficiently described the facts of  
4 this case and, as a result, its arguments regarding damages are speculative. (*See generally* ECF  
5 No. 12). The court disagrees. The allegations in the complaint, on their face, indicate that  
6 plaintiff's condition is serious, has required treatment, and will continue to require treatment.  
7 The evidence defendant submitted—the expert opinion of Dr. Odisho and the punitive damages  
8 awards in other pharmaceutical-cancer cases—rise above speculation: the amount in controversy  
9 is likely to exceed \$75,000.

10 The court finds that the amount in controversy is met. The court has jurisdiction over this  
11 action and denies plaintiff's motion to remand accordingly.

12 *B. Stay*

13 The court notes that the CM/ECF system did not automatically generate a response  
14 deadline when defendant filed the instant motion to stay. (ECF No. 11). Thus, plaintiff has not  
15 responded to the motion. However, plaintiff's principal concern—and the basis for his motion to  
16 expedite—has been the propriety of defendant's removal. (ECF Nos. 6; 7). The court finds that,  
17 having ruled on plaintiff's motion to remand, the motion to stay is ripe for consideration.

18 The Judicial Panel on Multidistrict Litigation ("JPML") has already conditionally  
19 transferred this action to the Zantac MDL. (ECF No. 11 at 3). Plaintiff opposes the transfer and,  
20 as a result, the transfer issue is being before the JPML. *Id.* Defendant expects that the JPML  
21 will decide whether to transfer this action sometime in July or August. *Id.* at 3–4.

22 In the meantime, the court finds that judicial economy is best served by staying this  
23 action. Accordingly, the court grants defendant's motion and stays this action pending transfer  
24 to the MDL.

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26 ...

27 economic damages").  
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**James C. Mahan**  
**U.S. District Judge**